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No. 912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

STANLEY STOUT AND FRANCES STOUT,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Paul Reed Taylor, on behalf of Stanley Stout and Frances Stout, prays that a Writ of Certiorari issue to review the Decision and order of the United States Court of Appeals for the Second Circuit, entered on February 6, 1956, affirming an order of the United States District Court for the Western District of New York, in favor of the United States of America (Defendant in the District Court) dismissing the Petitioners, (Plaintiffs in the District Court) complaint in an action for a declaratory judgment to declare unconstitutional the Agricultural Adjustment Act of 1938, as amended and supplemented (hereinafter called the "Act") and the

Regulations issued thereunder and particularly the Regulation in regard to the persons eligible to vote to make the Act effective.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 229 F. 2d 918, and appears in the Appendix, infra, pp. 14a, 15a. The Opinion of the United States District Court of the Western District of New York is not reported. It appears in the Appellants' Appendix filed in the United States Court of Appeals for the Second Circuit (page 12-a Appellant's Appendix.)

JURISDICTION

The order of the Court below (Appendix, infra., p. 16a) was entered on February 6, 1956. The jurisdiction of the Court is invoked under 28 U.S.C.A. 1254.

QUESTIONS PRESENTED

The petitioners own in fee simple a farm of 202 acres in Yates County, New York. On their farm they raise and use wheat. They sell no wheat and intend to sell no wheat. They use their own home grown wheat for legal, healthy and proper purposes, namely, food for their beasts and fowl and thereby food for themselves. Their complaint more fully appears at pages 2a-5a of the Appellants' Appendix. The narrow question presented on this petition is:

1. Is the United States immune from suit in this action for a declaratory judgment?

2. The question subsidary to the above is the constitutionality of the Act and the voting requirements regulation.

STATUTES INVOLVED

The Agricultural Adjustment Act of 1938, as amended,

(7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq.) provides in pertinent part:

"7 U.S.C.A. Sec. 1340

"(1) The farm marketing quota under this chapter for any crop of wheat shall be the actual production of the acreage planted to wheat on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to wheat on the farm which is in excess of the farm acreage allotment for wheat.

"The normal production, or the actual production, whichever is the smaller, of such excess acreage is hereinafter called the 'farm marketing excess' of wheat. For the purpose of this section 'actual production' of any number of acres of wheat on a farm means the actual average yield of wheat for the farm times such number of acres.

"(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

"(3) The farm marketing excess for wheat shall be regarded as available for marketing, and the penalty and the storage amount or amounts to be delivered to the Secretary of the commodity shall be computed upon the normal production of the excess acreage. Where, upon the application of the producer for an adjustment of penalty or of storage, it is shown to the satisfaction of the Secretary that the actual production of the excess acreage is less than normal production thereof, the difference between the amount of the penalty or storage as computed upon the basis of normal production and as computed upon the basis of actual production shall be returned to or allowed the producer. The Secretary shall issue regulations under

which the farm market excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. Any wheat delivered to the Secretary hereunder shall become the property of the United States and shall be disposed of by the Secretary for relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from the normal channels of trade and commerce.

• • • • • • •

"(7) A farm marketing quota on wheat shall not be applicable to any farm on which the acreage planted to the commodity is not in excess of fifteen acres. • • •

"(8) Until the farm marketing excess of wheat is stored or delivered to the Secretary or the penalty thereon is paid, each bushel of the commodity produced on the farm which is sold by the producer to any person within the United States shall be subject to the penalty as specified in paragraph (2) of this section. Such penalty shall be paid by the buyer, who may deduct an amount equivalent to the penalty from the price paid to the producer.

• • • • • • •

"(12) Notwithstanding any of the foregoing provisions, the farm marketing excess for any crop of wheat for any farm shall not be larger than the amount by which the actual production of such crop of wheat on the farm exceeds the normal production of the farm wheat-acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary. • • •"

"7 U.S.C.A. 1375

"(a) The Secretary shall provide by regulations for

the identification, wherever necessary, of corn, wheat, cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under this chapter.

"(b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this chapter."

REGULATIONS INVOLVED

In 18 Federal Register Page 4221 on July 18, 1953, the Acting Secretary of Agriculture published the regulation in regard to voting as follows:

"Elibility to Vote. 1. Each farmer who is engaged in the production of wheat for harvest in 1954 on a farm on which the acreage to be planted to wheat for harvest in 1954 is in excess of 15 acres and who is entitled to share in the proceeds of the 1954 wheat crop as owner, landlord (other than a landlord of a standing rent, cash rent or fixed rent tenant) tenant, or sharecropper shall be eligible to vote."

STATEMENT

The complaint attacks the constitutionality of the Government's present wheat program 7 U.S.C.A. 1281 et seq., as discriminatory in voting, a violation of the plaintiffs' rights under Amendments Four and Five and other constitutional provisions. The present issue involves procedural problems and the question of sovereign immunity.

REASON FOR GRANTING THE WRIT

The doctrine of sovereign immunity does not apply in this action to declare the wheat allotment statutes unconstitutional.

Petitioners, who want to raise sufficient grain to feed their own chickens and cattle and to have proper rotation of crops on their farm, cannot do it under 7 U.S.C. 1281 et seq. It is common knowledge that eligible farmers in northeastern United States do not vote favorably on imposition of quotas. Quotas find their support in other areas. Poultry raisers find their business unprofitable at support prices of wheat. They can grow their own for less money. The government permits growing one's own corn. Plaintiffs instead of adopting one of the many easy devices to avoid the law, seek to have it declared unconstitutional. The most flagrant feature appears to be the plutocratic franchise provision. Any farmer with a quota of less than fifteen (15) acres of wheat cannot vote on imposition of quotas. On the trial petitioners will prove that thirty thousand farmers in New York state could not vote and only six thousand could. In fact, under such a discriminatory scheme voting is not a right but a special privilege reserved to the larger operators. Petitioners' complaint takes in far more ground than *Wickard v. Filburn* (1924), 317 U. S. 111 and resembles the prior contrary peace-time decision, *United States v. Butler* (1935) 297 U. S. 1. In our case the government seeks to and in the district court did, dispose of the case on procedural points, principally that the government enjoys immunity from suit by its citizens in an attack on the constitutionality of a statue. How will the dignity or well-being of the government suffer in an orderly declaratory judgment action in the Western District of New York where the operation and effect of the statute on local people can be proved at a cost within the reach of an ordinary citizen? Cornell University with it's accumulation of agricultural knowledge lies within 100 miles of Rochester and Elmira where the Western District hold Court.

In an opinion of the Court, Justice Frankfurter pointed out the obsolete characteristics of the doctrine of sovereign immunity:

> "But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment." *National Bank v. Republic of China* (1955), 348, U. S. 356, 359.

and further, at page 360,

> "The outlook and feeling thus reflected are not merely relavent to our problem. They are important. The claim of dominant opinion rooted in sentiments of of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady, legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process." See James M. Landis, Statutes and the Sources of Law, in Harvard Legal Essays (1934) p. 213 et seq.; Harlan F. Stone, the Common Law in the United States, 50 Harv. L. Rev. 4, 13-16,

see also:

"The Jurisdictional Immunity of Foreign Sovereigns" 63 Yale Law Journal 1149 (1954).

As an alternative to this action for a declaratory judgment establishing the rights of the parties, the parties may be reversed at a later date. Farmers have high authority for raising technical defenses.

> Simeon E. Baldwin, Hubbard Lectures on Legal Ethics, quoted in Cases and Materials on the Legal Profession, Elliott E. Cheatam, page 146.

Such litigation will show the weakness of the wheat law as an enforceable law, will cost a lot for prosecution and defense.

Rule 57 of Rules of Civil Procedure and Section 2201 of Title 28 of the United States Code provide for better procedure by a Declaratory Judgment action. Professor Borchard's work and philosophy is well known to this Court. The United States District Court in New Jersey has approved this type of action even though the United States is a party.

> "Therefore the theory of the plaintiff is not thwarted by the objection of the United States that it cannot be called to respond to a declaratory judgment action under the circumstances of the case."
>
> *Pennsylvania R. Co. v. United States* (D.C.N.J. 1953) 111 F. Supp. 80.

Appellants further maintain that enactment of the Declaratory Judgment Act constitutes consent by the government to test the constitutionality of this statute which lies outside of the area of war and public defense powers and ordinary policy powers and that discussions of immunity appearing in opinions like *Wilson v. Wilson* (1944 4th circ.), 141 F. 2d 599 should be reread in view of *National City Bank v. Republic of China* (1955) 348 U. S. 356.

DISCRIMINATORY VOTING REQUIREMENTS

The crop for harvest in the summer of 1954 had to go into the ground in the autumn of 1953. In 18 Federal Register page 4221 on July 18, 1953, the Acting Secretary of Agriculture published the regulation in regard to voting limiting eligibility to those who have an allotment of 15

acres. In *Eubank v. City of Richmond* (1912) 226 U. S. 137 a city ordinance was declared invalid because:

> "One person having a two-thirds ownership of a block may have that power (to establish a building line) against a number having a less collective ownership." 226 U. S. at page 144.

We interpret this as a ruling against making statutes or ordinances enforceable by an unequal vote or discriminatory voting practices.

Insofar as the small and medium farmer is concerned, the Statute has gone into operation without his being permitted to vote on it. He is taxed a penalty. This all adds up to violation of a clear fundamental right of franchise and taxation without representation.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

PAUL REED TAYLOR
Attorney for the Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 122—October Term, 1955.

(Submitted January 16, 1956 Decided February 6, 1956.)

Docket No. 23753

STANLEY STOUT AND FRANCES STOUT,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

MEDINA, HINCKS AND WATERMAN,

Circuit Judges.

Appeal from an order of the District Court of the United States for the Western District of New York. Harold P. Burke, *Judge.*

Plaintiffs appeal from an order dismissing their action for a declaratory judgment as to the constitutionality of the wheat allotment states, 7 U. S. C. A. §1281 *et seq.*, and other relief. Affirmed.

TAYLOR, CORCORAN & JENNINGS, Penn Yan, New York (Paul Reed Taylor, Penn Yan, New York, of Counsel), *for plaintiffs-appellants.*

JOHN O. HENDERSON, U. S. Attorney in and for the Western District of New York, Buffalo, New York (Donald F. Potter, Buffalo, New York, Assistant U.S. Attorney, of Counsel), *for defendant-appellee.*

PER CURIAM:

Plaintiffs complain that the existing wheat quotas imposed under 7 U. S. C. A. § 1281 *et seq.* prevent them from raising sufficient grain to feed their poultry and cattle and from properly rotating their crops. They brought this action against the United States seeking to have these provisions declared unconstitutional and their enforcement enjoyed, because of their discriminatory voting provisions.

Although *Blattner v. United States*, 127 F. Supp. 628, aff'd, 3 Cir., 223 F. 2d 468, which seems directly in point, is authority for dismissal on the merits under the rule stated in *Wickard v. Filburn*, 317 U. S. 111, we do not reach the substantive question. Neither by the Declaratory Judgment Act nor otherwise has the United States consented to be sued in this type of action. *Brownell v. Ketcham Wire and and Mfg. Co.*, 9 Cir., 211 F. 2d 121; *Blattner v. United States*, 3 Cir., 223 F. 2d 468. Without such consent, it is immune to suit. Accordingly, we hold that the District Court lacked jurisdiction over the defendant, and hence the action was properly dismissed.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and fifty-six.

PRESENT: HON. HAROLD R. MEDINA
HON. CARROLL C. HINCKS
HON. STERRY R. WATERMAN
Circuit Judges.

STANLEY STOUT AND ANOTHER

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA

Defendant-Appellee.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO,
Clerk